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IN THE

Supreme Court of the United States

October Term, 1965
No. 1142

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CHARLES WESLEY FURNISH,

Respondent.

Petition for Writ of Certiorari to The Supreme Court of the State of California.

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CHARLES WESLEY FURNISH,

Respondent.

Petition for Writ of Certiorari to The Supreme Court of the State of California.

The State of California prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in the above case on November 12, 1965.

Opinions Below.

The opinion of the California District Court of Appeal, Second Appellate District, Division Two, printed in Appendix A hereto, is reported at 229 A.C.A. 467, 40 Cal. Rptr. 316. The opinion of the Supreme Court of California, printed in Appendix C hereto, is reported at 63 A.C. 536 and 407 P. 2d 299.

Jurisdiction.

The Supreme Court of the State of California first entered judgment in this case on November 12, 1965. On February 2, 1966, our application for a stay of exe-

cution was granted pending final determination of this proceeding. (*People v. Furnish,* 64 A.C. [Minutes], No. 1, p. 8.) Pursuant to the 22nd rule of this Court, our time to file a petition for writ of certiorari was extended by Mr. Justice White until March 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented.

The sole question presented is whether respondent's confessions to the murder of his 20-month-old daughter were inadmissible under *Escobedo v. Illinois,* 378 U.S. 478.

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, respondent was charged with the murder of Star Furnish. [Cl. Tr. p. 1.][1] In a jury trial, he was found guilty of second degree murder and was sentenced to state prison for the term prescribed by law. [Cl. Tr. pp. 70, 72-73.] On his appeal to the California District Court of Appeal, Second Appellate District, Division Two, the judgment was affirmed. [*People v. Furnish,* 229 A.C.A. 467, 40 Cal. Rptr. 316]. He filed a petition for hearing with the Supreme Court of the State of California, and his petition was granted on October 21, 1964. (App. B.) Upon the hearing, the California Supreme Court reversed the judgment of conviction. (*People v. Furnish,* 63 A.C. 536, 407 P. 2d 299.)

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[1]Cl. Tr. refers to the Clerk's Transcript and Rep. Tr. refers to the Reporter's Transcript. Certified copies of both transcripts accompany this petition.

Statement of Facts.

The essential facts may be summarized as follows: Star Furnish, aged 20 months, was the youngest of the four Furnish children. Mrs. Furnish, respondent's wife, found Star's body in her crib at approximately 12:30 p.m. on May 10, 1962, a plastic bag over her head. [Rep. Tr. pp. 1369-1370.] Mrs. Furnish ripped the bag across the child's nose, then telephoned her husband, who was at work, and summoned a doctor who formed an opinion that Star had died at least 6 to 12 hours earlier but who mistakenly told the investigating officers that she died only 2 to 6 hours earlier. [Rep. Tr. pp. 1405, 2040-2041.] Mrs. Furnish and her husband were taken to the police station and she was later booked on a homicide charge. [Rep. Tr. pp. 576, 589.]

The following morning, May 11th, an autopsy was performed on Star's body and the time of death established as having occurred between 2 and 4 hours after her last meal consisting of a hamburger and french fried potatoes. [Rep. Tr. pp. 200-202.] Star ate her last meal around 6 or 6:30 p.m. on May 9th, when both Mr. and Mrs. Furnish were at home. [Rep. Tr. pp. 1665-1668.] The cause of death was established as asphyxiation due to the plastic bag, and there was evidence, consisting of an experiment performed on the morning of the 11th, which tended to prove that Star could not have placed the bag over her own head. [Rep. Tr. pp. 195-197, 453-456, 467.] The bag was later examined for fingerprints, but none were found. [Rep. Tr. pp. 541-543.]

Upon learning the actual time of death, a detective named Carberry telephoned Furnish and asked him to

come to the Downey Police Station, which he did. [Rep. Tr. pp. 596-598.] There he was questioned by Carberry and other officers, making a number of statements which were received in evidence over objection following extensive testimony on *voir dire*. [See Rep. Tr. pp. 809, 831, 917-918 for the rulings of the trial court.] The judge had previously stated to counsel that "the Court will, if it feels the confession is freely and voluntarily given, it will be submitted to the jury. If it feels that it isn't, I will not." [Rep. Tr. p. 633.]

The substance of respondent's statements and of the testimony respecting their voluntary character is set out as follows in the opinion of the California Supreme Court at pp. 538-539 of 63 A.C. and at pp. 301-302 of 407 P. 2d:

> "After the police officers learned that Star could have died on the evening of May 9 when defendant was at home rather than the morning of May 10 when defendant was at work, they requested him to come to the police station. Defendant did so and talked with Officer Carberry from about 12:15 p.m. to 3 p.m. on May 11. According to defendant the officer denied his request to see Nancy, said that the police had information Nancy hated the child and had threatened to kill her two weeks later, and that the autopsy showed Star died one-half hour to two hours following her last meal. Carberry conceded that the foregoing discussion took place, but denied defendant's further claim that he said that Nancy was not entitled to the public defender and that an attorney would cost $1,700.

Defendant was next questioned for approximately four hours by Officer O'Donovan. About 15 minutes of the questioning occurred in a patio near the police station and the remainder in an interrogation room. The officer had suspected on the prior afternoon that defendant might be implicated in Star's death, and he sought to elicit any facts which defendant might have concerning the death. According to the officer, they discussed known facts concerning Star's death and hypothetical situations which would demonstrate the 'good and bad evidence.' In this latter connection O'Donovan testified that he informed defendant as to the value of different evidence because he did not want defendant to say something which he thought could clear his wife but which, upon closer examination, could be disproved. According to defendant, Officer O'Donovan said Nancy would spend the rest of her life in jail; that the children would become wards of the court, but that Nancy would be released if defendant could prove he killed Star. O'Donovan denied making any of such statements.

At the conclusion of the questioning the defendant admitted that he killed Star. Thereafter, between 7:15 and 7:45 p.m. he made a further statement in Captain Martin's office amounting to a confession of murder, a confession in the office of the Chief of Police between 7:45 p.m. and 8:45 p.m. which was tape recorded, and another confession between 9 p.m. and 11 p.m. which was taken down by a stenographic reporter. The latter statement was transcribed, and defendant signed the transcription. Between 11 p.m. and midnight, de-

fendant took part in an alleged reenactment of the crime at his home ,and during this period he was arrested. Between 12:30 a.m. and 1:15 a.m. on May 13, he had a conversation with his wife which, unknown to them, was tape recorded. Nancy was thereafter released by the officers.

At the trial testimony as to each of the statements made by defendant was introduced over objection. The tape recording of defendant's conversation with his wife was played to the jury, and the jury was given copies of the written statement. The other tape recording and the movies of the alleged reenactment were not offered into evidence.

Defendant testified in his own behalf as to his conversations with Officers Carberry and O'Donovan as noted, and further testified that at the time of his wife's arrest on May 10 Lieutenant Jamison told him 'somebody would have to pay for this' due to public opinion; that by 7 p.m. on May 11 he believed that if he confessed his wife would be released; that his sole purpose in confessing was to obtain his wife's release; that before confessing he told O'Donovan he would confess so that his wife could be released from jail, and that O'Donovan said ,'This is all right, let's do it.'

Lieutenant Jamison testified that he was not on duty May 10 and was not at the police station at any time on that day.

In his confessions defendant stated that Star, who had been unwanted, had come between him and his wife; that his wife hated Star and did not learn to love her as he hoped she would; that the ensuing

dissension had caused him to hate the child also and to begin considering means of doing away with Star; that on May 9 he had purchased hamburgers which the family ate at about 6 p.m. and that sometime between 7 p.m. and 8 p.m. when he put Star to bed, he knew that 'something had to be done.' Defendant said he went to the kitchen, took a plastic bag from the drawer, and after returning to Star's room pulled the bag over her head."

How the Federal Question Arose.

This is another case arising under *Escobedo v. Illinois,* 378 U.S. 478 and the interpretation placed upon that decision in *People v. Dorado,* 62 Cal. 2d 338, 398 P. 2d 361. In *Dorado,* the Supreme Court of California felt constrained by *Escobedo* to hold as a matter of federal constitutional law, that once the "accusatory" stage of a police investigation is reached, the police must advise a suspect who has not requested and been denied counsel of his right to consult with counsel and to remain silent, and that if he does not waive those rights, his free and voluntary confession may not be used against him at his trial. In the instant case, the California Supreme Court felt itself constrained by *Escobedo* and *Dorado* to hold, as a matter of federal constitutional law, that the "accusatory" stage had been reached prior to respondent's first admission that he had killed his child and that his first statement, as well as his subsequent ones, were improperly received in evidence. The California Supreme Court reached this conclusion notwithstanding the fact that Furnish was not arrested until after 11 p.m. on May 11th, notwithstanding the fact his wife was legitimately suspect, and notwithstand-

ing the clear conflict in the evidence upon the question whether Furnish sought to obtain a lawyer for his wife. The issues were fully argued before the California Courts in briefs which have been certified to this Court as a part of the record.

Reasons Why a Writ of Certiorari Should Be Granted.

1. The Decision Below Rests Upon a Misinterpretation of Escobedo v. Illinois, 378 U.S. 478.

Our criticisms of the maximal interpretation of *Escobedo* adopted by the California Supreme Court are set out in the briefs in *California v. Stewart,* October Term, 1965, No. 584 [argued March 2, 1966], and there is no need to recapitulate them here.[2] Suffice it to say that although Furnish was questioned at considerable length by the investigating officers, he came voluntarily to the police station in response to a telephone call and was not placed under arrest until late in the evening. His statements were therefore not "compelled" in the Fifth Amendment sense of the term. Nor, as the trial judge and jury found, were they "compelled" by any asserted coercion on the part of the officers.

Furthermore, respondent testified that he asked Carberry about retaining an attorney for his wife and that the officer told him he was not entitled to a public defender for her and did not need one and that a private attorney would cost $1700 in cash. This testimony was flatly contradicted by Carberry and by Officer O'Donovan. [Rep. Tr. pp. 690-692, 776-779, 807-

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[2]Copies of our briefs in *Stewart* will be served upon counsel for respondents concurrently with the service of this petition.

808.] And assuming for the sake of argument the validity of the *Dorado* interpretation of *Escobedo,* it would be incongruous to say that respondent was unaware that he could consult with counsel in view of his own testimony at trial that he wished to obtain counsel for his wife.

2. The Instant Case Demonstrates the Undesirability of the Dorado Interpretation of Escobedo.

It will be recalled that no fingerprints were found on the plastic bag that caused the death of respondent's daughter. There were no other physical clues. The case was, therefore, not one susceptible of solution through the refined techniques of scientific investigation. A helpless child was found dead in her crib under circumstances suggesting premeditated murder, and it was first thought that she died when her mother was at home alone. The officers could not leave Mrs. Furnish to roam at will among the remaining children. There was no impropriety in requesting Mrs. Furnish and her husband to come to the police station for questioning on May 10th and none in asking him to return the following day when the time of death was finally ascertained. Only through questioning of those responsible for Star's safety could the officers fix responsibility for the murder.

The only evidence against Furnish consisted of the statements which he made to the investigating officers and the tape-recorded conversation between Furnish and his wife. The latter should be read in its entirety for it is psychologically compelling and sufficiently moving to make the gods weep. [Rep. Tr. pp. 921-951.] If his statements are inadmissible, as the California Supreme

Court held, then the mute body of his child will simply become a part of the social cost which will accrue if the police are precluded from asking questions in cases where asking questions is the only way of ascertaining the truth.

Conclusion.

For the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

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APPENDIX A.

Opinion of the District Court of Appeal.

[Crim. No. 9029. Second Appellate District. Division Two. Filed August 27, 1964. J. T. Alley, Clerk.]

The People of the State of California, Plaintiff and Respondent v. Charles Wesley Furnish, Defendant and Appellant.

Appeal from judgment and from sentence of the Superior Court of Los Angeles County. Frank J. Macklin, Judge. Judgment affirmed. Appeal from sentence dismissed.

For Appellant: Mark F. Joseff, Arnold P. Mordkin, Don Harper Mills, and Max Hara.

For Respondent: Stanley Mosk, Attorney General; William E. James, Assistant Attorney General; Gordon Ringer, Deputy Attorney General.

Defendant appeals from the judgment entered following a jury trial which resulted in his conviction of the crime of murder of the second degree. His plea of not guilty by reason of insanity and his motion for a new trial were voluntarily withdrawn prior to any ruling thereon. Appellant urges only two grounds for a reversal: (1) that there was insufficient proof of the corpus delicti, and (2) that his confession was involuntary and therefore erroneously received in evidence.

The record discloses that the decedent, Star Furnish, was the twenty-month old daughter of appellant and his wife, Nancy. This child was the youngest of their four children. Apparently she was unwanted and had been a cause of dissension in the family since her birth. At about 1:15 p.m. on May 10, 1962, a nurse

working for a Dr. Presser received a telephone call from appellant's wife in which the latter stated that her daughter Star had been found dead with a plastic bag over her head. When Dr. Presser arrived at appellant's residence, he found the deceased child lying on her back in her crib with a plastic bag over her head which had been ripped diagonally across the face. There were droplets and a film of moisture on the bag.

Dr. Presser noticed that rigor mortis already had set in and, although he formed an opinion that Star had died at least six to twelve hours earlier, he mistakenly told the officer that she had died two to six hours earlier. It was reported that appellant had left for work at 6:30 a.m. that morning. Mrs. Furnish testified that although she had "peeked" into the room twice during the morning, she had not observed the plastic bag and had assumed that the child was "merely sleeping". The child had been "fussy" with a cold for several days and had a "runny nose". The mother testifed further that when she entered to awaken her child, she observed the bag and immediately tore it open and away from its face; that she then realized that the child was dead and thereupon immediately called her husband and the doctor.

One of the investigating officers testified that he had found a bag identical in size and texture to the one found on the child's head in a kitchen drawer of the home. At the coroner's office, this officer attempted to place this second bag over the dead child's head while she was lying supine but was unable to do so. However, when the body was lifted to a sitting position, the officer was able to place the bag over her head, although it was tight and he had "to work it down sideways" to

get it past her forehead. In his opinion, based upon these experiments, the child could not have put the bag over her own head.

An autopsy revealed that the child had died the preceding evening within two to four hours after her last meal. The forensic pathologist, who performed the autopsy, found fragments of ciliated columnar epithelial cells emanating from the respiratory system on the plastic bag thus establishing that the child had been alive when the bag was placed over her head. He identified the moisture found on the inside of the bag as a secretion from her nostrils or mouth. He found no evidence that she was suffering from pneumonia or that she died from acute interstitial pneumonitis. He testified that in his opinion the cause of death was asphyxiation caused by the plastic bag covering.

When one of the investigating officers learned the results of this autopsy, fixing the time of death earlier than that originally indicated, he telephoned appellant and asked him to come to the station to talk with him further. (Appellant's wife had been held for investigation of the murder following the reports initially received by the officers the preceding day.) This officer testified that, following two extended conversations held that afternoon, appellant admitted killing his child and that this original conversation and the subsequently reported confessions and reenactments were free and voluntary on appellant's part and were given without any promise of immunity or reward.

In his recorded confession, the transcript of which he had signed, appellant told the officers that he felt very close to Star at the time of her birth but that his

feelings changed into hate, an emotion which split up the whole family because Star was neither planned for nor wanted. He said that the idea of killing her occurred to him about two months before her death. At that time he considered using the plastic bag or having an automobile accident. Asked to describe the event of May 9th, appellant said that he got up early in the morning, went to work, spent an aggravating day, returned home at about four o'clock, talked to his wife, who was still in bed, and then went out and bought hamburgers. His wife ate her dinner in the bedroom while he and the children ate in the kitchen. Star ate the meat from one of the hamburgers as well as some French fried potatoes and salad.

It was when he started getting her ready for bed that he knew he had to do something, Star having been responsible for the lack of affection between himself and his wife. He put her to bed at approximately eight o'clock p.m., first changing her dirty diapers which he threw on the floor; then, having stood her up in her crib by the rail, he went to the kitchen, took a plastic bag from a kitchen drawer, returned and placed the bag over her head. Star was then still standing at the rail of the crib; he turned around, turned out the light and closed the door. When asked whether it was difficult to put the bag over his daughter's head, he replied, "It was a close fit." It was his intention to bring about Star's death.

Returning to the kitchen, appellant sat at the kitchen table for about fifteen or twenty minutes; his wife and the other children were watching television in the bedroom; he heard Star crying softly for two or three minutes; at that time he thought that he had done "the

proper thing" and that everyone would be happier and better off. The next morning he got up, went to the kitchen, prepared his lunch, and left for work at about 6:30 a.m. He telephoned home about 11 a.m., but did not discuss the children with his wife. Mrs. Furnish called him between 1 and 2 p.m. and told him in an emotional way that Star was dead, that there was a plastic bag over her head and that she had nothing to do with it; he told her that he knew she had not done it.

Shortly after he returned home, a doctor and nurse arrived. When asked whether he intended to tell the doctor what really had occurred, he said that he did not intend to tell anyone. When asked why he did not admit his guilt after his wife was arrested, he said he believed Star's death would be passed off as an accident and that his wife would be released immediately. Upon being asked whether he was making a statement primarily to have his wife released, or because the statement was true, he replied that the statement was true, and that his wife was being released because she had nothing to do with the murder and knew nothing of what he had done.

When asked whether he understood that if his statements subsequently were proved to be false it would tend to show that he had guilty knowledge of his wife's criminal responsibility, he replied that this already had been explained to him. When asked whether he would confess his guilt if he knew his wife was guilty, he said he would not because his confession would endanger the other children, and when asked whether he would allow his wife to be prosecuted if she were, in fact, guilty he said he would, because it "would be for her own good."

Later appellant reenacted the crime and a motion picture thereof was taken, but it was not introduced at the trial. Appellant asked to be allowed to tell his wife of his confession, stating that she would not believe it if one of the officers told her. Although appellant was not so advised, this conversation was similarly recorded.

In this conversation appellant told his wife that he had killed their daughter because for some reason he had grown to hate her. Mrs. Furnish told him that she did not believe him. When she suggested that he had confessed because he thought she had killed Star, he said, "No. Something snapped. I don't know what it was." He also said: "I know it's something I had to do. I couldn't take it any longer." When Mrs. Furnish again suggested that he was protecting her, he said: "It's not to protect you. Last night I talked two hours to convince these guys that it wasn't. That's the first thing they said. I figured it would go just as an accident. You read about it all the time in the papers—just an accident."

Appellant then told his wife that he could describe the plastic bag he put over Star's head and she admitted that she could not have described it before the officers showed it to her. When she protested again that he could not have killed Star, appellant said: "All I can say is that I did it and I'm sorry, honest to God I'm sorry." He told her that she and the other children were in the bedroom watching television while he committed the murder. He said he was sick of feeding and changing Star; he was "just sick, sick of the whole mess." He also said that he had informed the officer that if they told her he had confessed, she would never believe it.

He told her that he had killed Star when he put her to bed.

An officer also described a conversation he had with appellant en route to the Downey Municipal Court on May 14th. This officer told appellant that he had met his attorney and asked him if he still felt the same way as he did the night when he signed his confession. According to the officer, appellant said, "Yes, he had done it, he had killed his daughter." adding further: "But this is something you won't believe. I really didn't recall it until I received a phone call at work." When asked why he had not put Star out for adoption, appellant told the officer that society, his family and friends would have "look[ed] down on [him]."

By way of defense, appellant took the position that the child actually had died of an infection, probably acute pneumonitis, or, in the alternative, that his wife had committed the crime. Both of these contentions were found to be unacceptable by the jury. Appellant sought to explain away his confessions by stating that although the police exerted no direct threats or coercion upon him, they did advise him that if he did not confess his wife would be put in prison for life and his children made wards of the court.[1] He testified that

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[1]It may be noted that the mutually exclusive nature of appellant's contentions regarding his feelings for his wife made it extremely difficult for the jury to draw any conclusion other than that he was a man who would go to any lengths to avoid the consequences of his own actions. That is, it is most difficult to accept the explanation that appellant's comprehensive, detailed and psychologically consistent confession was the result of an excess of love and compassion for his wife when, at the same moment, he was seeking to prove that she, not he, was responsible for the murder of his daughter. During his opening statement, his counsel stated: "We will be offering evidence to show that Charles Furnish did not commit this crime because his wife did, Nancy Furnish did it."

the officers told him what to say in his transcribed confession. Each of these assertions was denied by the officers and the reporter who had recorded his confession.

It is manifest from the foregoing that appellant's contentions are wholly without merit. The requirements for establishing the corpus delicti in a murder case are well summarized in *People v. Misquez,* 152 Cal. App.2d 471, 477-478 as follows:

"In a murder charge the corpus delicti consists of two elements: the death of the alleged victim and the existence of some criminal agency as the cause. (*People v. Cullen,* 37 Cal.2d 614, 624 (234 P. 2d 1], and cases cited.) The corpus delicti must be proved by evidence independent of the extra-judicial statements of the accused. But, as a prerequisite to the reception of a defendant's extrajudicial statements in evidence, the corpus deliciti need not be established by proof as clear and convincing as is necessary to establish guilt. (25 Cal. Jur. 2d 510-513, and cases cited.) The corpus delicti need only be shown by some evidence, and a *prima facie* showing that the alleged victim met death by a criminal agency will suffice. (*People v. Corrales,* 34 Cal.2d 426, 429 [210 P. 2d 843]; *People v. Mehaffey,* 32 Cal.2d 535, 545 [197 P. 2d 12], and cases cited.) Furthermore, the corpus delicti may be established wholly by circumstantial evidence and by inferences reasonably derived therefrom. (*People v. Corrales, supra,* 34 Cal.2d 426, 429; *People v. Mehaffey, supra,* 32 Cal.2d 535, 545.) And such evidence need not connect defendant with the commission of the crime. (*People v. Amaya,* 40 Cal.2d 70, 76 [251 P.2d 324]."

In the present case, there was expert testimony that was accepted by the jury establishing that the cause of

death was the presence of a plastic bag upon the child's head. There was evidence that this particular bag must have been placed on the child by some other person because it was too small to have permitted her to place it there herself. In this connection, appellant makes the following obscure observation:

"A person's placing a plastic bag on a child's head would not of itself indicate an unlawful act. It is not a crime of any kind merely to put a bag on a child's head. A search of the cases and statutes has revealed nothing making it unlawful to possess plastic bags, to play with plastic bags or to use plastic bags in any manner." No "cases or statutes" are required to make unlawful the manner in which this plastic bag was used. The corpus delicti was established by very substantial evidence which was more than sufficient.

Equally unmeritorious is the contention that, as a matter of law, this court must hold appellant's confessions to have been obtained by unlawful means. The evidence with respect to this issue was sharply conflicting. In accordance with settled law, the trial court initially resolved this conflict in favor of the prosecution and the jury thereafter concurred upon appropriate instructions whose sufficiency and correctness are not challenged.

The rule was recently restated in *People v. Robinson*, 61 A.C. 413, 431-432 as follows: "The contention is that Robinson's extrajudicial statement should have been excluded because it was involuntary. Such contention overlooks the manner in which the statement was admitted. The trial judge allowed the parties to produce evidence in a *voir dire* proceeding before determining whether he would allow the extra-judicial state-

ment to be read into evidence. He advised the jury that the evidence thus to be produced was received for the sole purpose of determining whether the alleged statement was voluntary or involuntary. The evidence so produced was in direct conflict, and the trier of fact certainly had the right to accept either the prosecution's version or that of Robinson and his witnesses. This constituted a simple factual issue. At the conclusion thereof, the trial judge expressed to counsel, and out of the presence of the jury, his disbelief of Robinson's claims. Under proper instructions he allowed the jury to determine whether or not the statement was voluntary. The parties, in their briefs, argue the merits of the facts testified to by the various witnesses. But we are not concerned with that question. That was the sole concern of the jury. The cases on which appellants rely deal with claims of coercion in which the facts were not in dispute. While it is true that the prosecution has the burden of proving that the alleged confession was voluntary (*People v. Rogers,* 22 Cal.2d 787 [141 P. 2d 722]), the trial court here required the prosecution to produce such evidence before allowing the confession to go before the jury. It is the function of the jury, and not of this court, to choose between the conflicting testimony of the parties. . . ."

During oral argument appellant cited the recent case of *Escobedo v. Illinois,* ....U.S. .... (June 22, 1964) in support of his contention that his several confessions should not have been received in evidence. We do not consider the circumstances presented in *Escobedo* to be sufficiently similar to the instant record to require application of its general holding here. In *Escobedo* a suspect who theretofore had retained an attorney was

questioned at length despite his immediate and repeated requests to see his attorney. His several requests were denied, although his attorney was present at police headquarters at the time, seeking in vain to consult with his client. In addition, there was affirmative evidence that the suspect was not advised of his constitutional right to remain silent. Under these circumstances, the United States Supreme Court held that the suspect had been denied his right to counsel and that, as a result, the admissions of guilt he made during his interrogation were not admissible at his trial.

In the instant case the only evidence relating to this issue was appellant's testimony that on the morning following the arrest of his wife, he called at police headquarters to inquire as to the status of the matter. He testified that at that time he inquired of one of the officers concerning counsel for his wife, and was informed that "a minimum of $1700 would be required cash" and when he asked about the public defender, he was told "that [he] was not entitled to a public defender, nor did [he] need one at that particular time." He thereupon left the police station and did not return until called by the officers later in the day after they learned that the time of death had been earlier than first believed. The truth of these assertions was denied directly or indirectly by the several officers involved.

There is nothing in the present record to indicate that appellant, either prior to or at the time of his confession, expressed any desire to see an attorney concerning his statements. Moreover, it is not claimed that he was unaware of his right to remain silent. In fact, during his conversation with his wife, which he was not

advised would be recorded, and which occurred between the two sessions in which his recorded confession was taken, appeallant was asked by his wife: "Did you ever call Aunt . . .?" He replied, "No, I knew I didn't need her for you and all I need is a public defender."

Since it does not appear that appellant was denied any of his constitutional rights with regard to counsel, we are not confronted with the issue which was presented in *Escobedo.* There is nothing in the language of that decision which would justify or require any conclusion to the effect that the holding and the reasoning of the majority and concurring opinions in *People v. Garner,* 57 Cal.2d 135 do not continue to represent the valid and controlling law of California with respect to the question here presented.

It is well settled that a confession secured through a threat to arrest a near relative, or by a promise to release one, may not be received in evidence. (*People v. Trout,* 54 Cal.2d 576, 583-585; *People v. Mellus,* 134 Cal.App. 219, 223-225.) Here, however, the officers denied making any such threats or promises and such testimony was accepted by the trier of the facts. A confession is not to be held involuntary simply because it was made in order to exculpate another person. (*People v. Jones,* 221 A.C.A. 40, 43.)

In the instant case, rather than inducing a confession by promises of freeing his wife in return therefor, the officers advised appellant that if he were merely attempting to take the blame for her and subsequent investigation were to establish her guilt, his confession would harm her, not help her. The fact that the officers

might have given appellant the impression (after he had twice admitted his guilt) that if his confession, tested by their independent investigation, convinced them of his wife's innocence, she would be released, would not render such admissions inadmissible. Certainly his wife was not being detained without reasonable and probable cause, and there is nothing in the testimony of the officers to the effect that her release would be granted in exchange for his confessions.

The judgment is affirmed, and the purported appeal from the sentence is dismissed.

Herndon, *J.*

We concur.

Fox, *P. J.*

Roth, *J.*

APPENDIX B.

Order Due
October 26, 1964.

Order Granting Hearing after Judgment by District Court of Appeal 2nd District, Division 2, Crim. No. 9029.

In the Supreme Court of the State of California in Bank

People v. Furnish.

Filed Oct. 21 1964 William Sullivan, Clerk By D. Blomgren, L.A. Deputy.

Mosk, *J.*, did not participate.

Appellant's petition for hearing Granted and cause transferred to this court.

Traynor
Chief Justice

Peters
Justice

Tobriner
Justice

Peek
Justice

Schauer
Justice

APPENDIX C.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California in Bank

The People, Plaintiff and Respondent, v. Charles Wesley Furnish, Defendant and Appellant. Crim 8314.

Filed Nov. 12, 1965. William Sullivan, Clerk. By K. Hawkes, S.F. Deputy.

A jury found defendant guilty of murder of the second degree, and he has appealed from the ensuing judgment.

The decedent, Star Furnish, was the twenty-month old daughter of defendant and his wife Nancy. On the morning of May 10, 1962, as was his custom, defendant left the house for work at 6:30. After serving breakfast to three older children later that morning Nancy looked briefly into Star's room on two occasions. Thinking that the child was asleep and, assuming that she might not feel well, Nancy concluded it best not to awaken her.

Shortly before 1:00 p.m. Nancy again went into the room and found Star with a plastic bag over her head. She ripped the bag from Star's face, and immediately telephoned a doctor and the defendant.

The doctor noticed that rigor mortis had set in, and although he formed an opinion that Star had died at least six to twelve hours earlier, he mistakenly told police officers that she had died two to six hours earlier. At about 2:00 p.m. defendant and Nancy were taken to the police station and questioned by officers. At 5:00

p.m. Nancy was arrested and booked on a charge of homicide, and defendant was released.

In the Furnish kitchen police officers found a second plastic bag of the same size and texture as the one removed by Nancy, and an officer attempted to place it over the child's head. Because of the close fit he was able to do so only when the child's body was placed in an upright position and the bag was worked sideways. Based on the foregoing experiment the officer formed the opinion that Star could not have put the bag over her own head.

A pathologist who performed an autopsy was of the opinion that Star died two to four hours after her last meal and that it consisted of hamburger meat, bun, and leafy vegetable. Star had had such a meal about 6:00 p.m. on May 9 according to defendant and Nancy.

After the police officers learned that Star could have died on the evening of May 9 when defendant was at home rather than the morning of May 10 when defendant was at work, they requested him to come to the police station. Defendant did so and talked with Officer Carberry from about 12:15 p.m. to 3:00 p.m. on May 11. According to defendant the officer denied his request to see Nancy, said that the police had information Nancy hated the child and had threatened to kill her two weeks earlier, and that the autopsy showed Star died one-half hour to two hours following her last meal. Carberry conceded that the foregoing discussion took place, but denied defendant's further claim that he said that Nancy was not entitled to the public defender and that an attorney would cost $1,700.

Defendant was next questioned for approximately four hours by Officer O'Donovan. About fifteen minutes of the questioning occurred in a patio near the police station and the remainder in an interrogation room. The officer had suspected on the prior afternoon that defendant might be implicated in Star's death, and he sought to elicit any facts which defendant might have concerning the death. According to the officer, they discussed known facts concerning Star's death and hypothetical situations which would demonstrate the "good and bad evidence." In this latter connection O'Donovan testified that he informed defendant as to the value of different evidence because he did not want defendant to say something which he thought could clear his wife but which, upon closer examination, could be disproved. According to defendant, Officer O'Donovan said Nancy would spend the rest of her life in jail; that the children would become wards of the court, but that Nancy would be released if defendant could prove he killed Star. O'Donovan denied making any of such statements.

At the conclusion of the questioning the defendant admitted that he killed Star. Thereafter, between 7:15 and 7:45 p.m. he made a further statement in Captain Martin's office amounting to a confession of murder, a confession in the office of the Chief of Police between 7:45 p.m. and 8:45 p.m. which was tape recorded, and another confession between 9:00 p.m. and 11:00 p.m. which was taken down by a stenographic reporter. The latter statement was transcribed, and defendant signed the transcription. Between 11:00 p.m. and midnight, defendant took part in an alleged reenactment of the crime at his home, and during this period he was

arrested. Between 12:30 a.m. and 1:15 a.m. on May 13, he had a conversation with his wife which, unknown to them, was tape recorded. Nancy was thereafter released by the officers.

At the trial testimony as to each of the statements made by defendant was introduced over objection. The tape recording of defendant's conversation with his wife was played to the jury, and the jury was given copies of the written statement. The other tape recording and the movies of the alleged reenactment were not offered into evidence.

Defendant testified in his own behalf as to his conversations with Officers Carberry and O'Donovan as noted, and further testified that at the time of his wife's arrest on May 10 Lieutenant Jamison told him "somebody would have to pay for this" due to public opinion; that by 7:00 p.m. on May 11 he believed that if he confessed his wife would be released; that his sole purpose in confessing was to obtain his wife's release; that before confessing he told O'Donovan he would confess so that his wife could be released from jail, and that O'Donovan said, "This is all right, let's do it."

Lieutenant Jamison testified that he was not on duty on May 10 and was not at the police station at any time on that day.

In his confessions defendant stated that Star, who had been unwanted, had come between him and his wife; that his wife hated Star and did not learn to love her as he hoped she would; that the ensuing dissension had caused him to hate the child also and begin considering means of doing away with Star:

that on May 9 he had purchased hamburgers which the family ate at about 6:00 p.m. and that sometime between 7:00 p.m. and 8:00 p.m. when he put Star to bed, he knew that "something had to be done." Defendant said he went to the kitchen, took a plastic bag from the drawer, and after returning to Star's room pulled the bag over her head.

It is now established that an accused has a right to counsel at the prearraignment, accusatory stage and that a confession, where there has been a failure to observe that right, must be excluded. (Escobedo v. Illinois, 378 U.S. 478; People v. Dorado, 62 Cal. 2d 338.) Our decision in *Dorado,* which was predicated upon the prior decisions of the United States Supreme Court in Massiah v. United States, 377 U.S. 201, and Escobedo v. Illinois, *supra,* 378 U.S. 478, does not constitute a general prohibition against the admission of incriminating statements made by an accused or suspect. The prohibition is directed against procedures which deny to a suspect or an accused due process of law. (People v. Price, 63 A.C. 388, 396.) The use of a confession obtained in violation of *Escobedo* or *Dorado,* like the use of a coerced confession, generally requires reversal " 'regardless of other evidence of guilt.' " (People v. Dorado, *supra,* 62 Cal.2d 338, 356; People v. Schader, 62 Cal.2d 716, 728-731; People v. Jacobson, 63 A.C. 335, 346-347.)

In People v. Stewart, 62 Cal.2d 571, we held that normally the accusatory stage is reached when the officers have arrested the suspect and have undertaken a process of interrogation that lends itself to eliciting incriminating statements. We reasoned that the arrest encompasses two of the circumstances which indicate the advent of the accusatory stage, namely, that the investi-

gation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, and that the suspect is in custody. (People v. Stewart, *supra,* 62 Cal.2d 571, 577; see also People v. Bilderbach, 62 Cal.2d 757, 761.)

Of course in some situations where an investigation has focused on a particular suspect the authorities may, for reasons of their own and without advising the suspect, choose to detain him although he had not been formally placed under arrest. In that case the danger that such tactics may result in incriminating statements is as great as if the suspect had been formally arrested. In other words, if the formality of an arrest were a strict condition precedent to the advent of the accusatory stage, the police could, by delaying the arrest where the situation did not demand one, circumvent the accused's right to counsel and nevertheless subject him to tactics designed to elicit incriminating statements.

We are satisfied that, although an arrest ordinarily signals the advent of the accusatory stage, the fact of an arrest is not essential to the maturing of that stage. Rather, in determining whether such stage has been reached, all of the circumstances must be considered, including such factors as the evidence of guilt in the possession of the police, the pressures short of arrest which the police exert to detain the suspect, and other factors which may subject the suspect to unusual pressures.

In the instant case the police, when the correct time of death was known to them, realized that the evidence pointed to either defendant, his wife, or both of them. The fact that one person may be involved in a crime and has come under police suspicion does not preclude the investigation focusing upon a second suspect. (People v. Stewart, *supra,* 62 Cal.2d 571, 580.) The interrogations at the police station, to which defendant submitted at police request, were not limited to a period which might be anticipated for a witness who possibly might have some information relating to a crime, but continued for seven hours until defendant admitted that he had killed Star. The questioning then continued for several more hours during which defendant repreatedly confessed before he was formally arrested. Due regard for the *Escobedo-Dorado* rule and its purpose requires us to conclude that under the circumstances present here the accusatory stage was reached prior to the first confession and certainly prior to the several other confessions which followed and as to which testimony was introduced. The error in the admissions of such confessions is clearly prejudicial. (People v. Dorado, *supra,* 62 Cal.2d 338, 356-357; cf. People v. Jacobson, *supra,* 63 A.C. 335, 346-347.)

The prosecution has the burden of showing that a suspect, once the investigation has reached the accusatory stage, was informed of his constitutional rights to counsel and to remain silent at that stage, or that he knowingly and intelligently waived those rights. Waiver

cannot be presumed from a silent record. (Carnley v. Cochran, 369 U.S. 506, 516; People v. Lilliock, 62 Cal. 2d 618, 621-622.) The record before us is barren of any evidence that the authorities either informed defendant of his rights or that he waived them.

In view of the improper admission in evidence of the several confessions the judgment is reversed.

Peek, *J.*

We concur:

Tobriner *J.*
Peters, *J.*
Traynor, *C. J.*

People v. Furnish Crim. 8314.

CONCURRING OPINION BY BURKE, J.
TO
OPINION BY PEEK, J.

I concur in the judgment reversing the conviction of defendant under the application of section 4½, article VI, of the California Constitution. (See *People v. Watson,* 46 Cal.2d 818, 836, and *Fahy v. Connecticut,* 375 U.S. 85, 86-87.)

Burke, *J.*

We concur:

McComb, *J.*
*Schauer, *J.*

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.